EFFECT OF DEVISE OF WIFE'S SEPARATE ESTATE UPON CURTESY.

What is the effect, in Virginia, of the devise by a married woman of her equitable separate estate upon the husband's curtesy? In the absence of express provision in the settlement, barring the husband of his marital rights (or, at least, such expressions therein as may lead to the *inference* that such was the *settler's intention*), does the married woman's mere devise have that effect? These are the important questions examined in *Chapman v. Price*, 83 Va. 392, where Judge Hinton, delivering the unanimous opinion of the court, lays down the principle that in all cases of a settlement upon a married woman to her separate use, if she exercises her power of disposition by deed or will, the husband will be barred of curtesy; and Mr. M. P. Burks, in his excellent treatise on the Property Rights of Married Women (p. 17), has, seemingly with some hesitation, adopted the principle thus laid down.

To the writer the statement seems entirely too broad. It is unnecessary, even if space allowed, to go into any affirmative argument, but an examination of the case itself and of the authorities cited to sustain the position will be sufficient to demonstrate that such a sweeping statement can hardly be upheld.

In the first place, the decision on this point is itself a *dictum*. The only question before the Court in *Chapman v. Price* was, whether the husband of Susan J. Chapman should be entitled to curtesy in the land conveyed to her by deed, "to have and to hold in her own right, *free from any claims or demands from her husband, or any other person or persons, claiming under, through or against him in any way, now or at any time hereafter.*"

It is a well-established principle governing equitable separate estates that although the grantor may, if he choose, give the property to the wife, *free from the marital rights of the husband*, yet those rights are never to be divested to a greater extent than the terms of the instrument clearly require. *Mitchell v. Moore*, 16 Gratt. 275. Nothing can be clearer than the intent of the settler in *Chapman v. Price* to bar the curtesy of the husband, whether the wife exercised her power of disposition or not. What else can be the meaning of the phrase "*free from any claims or demands from her husband, &c., now or at any time hereafter*"?

This being so, there was no occasion to go further. The Court might have stopped at that point, and on that ground alone have refused the husband's curtesy. But the learned Judge, without considering this point, founds his decision on the conclusion that the wife, having power to dispose of her separate estate by will (under the statute), and having devised it, the husband is deprived of the curtesy *by the act of devise.*

Nor do the authorities cited by the learned Judge seem to sustain the position he assumes.

The only Virginia case touching the question cited by the Court in maintenance of its position is *West v. West*, 3 Rand. 373, in which some rather loose expressions of the judges, not necessary to the decision of the point before them, indicate that the husband's marital rights will be divested, if the wife dispose of her separate estate. That question, however, was not before the Court, and even if it had been, the expressions were not erroneous in that case. The husband having *separated* from the wife by mutual agreement before the date of the devise, and it being in evidence before the Court, and much dwelt on by them, that the settler (who was the father of the wife) entertained *very bitter feelings* toward the husband, the Court apparently considered it as established that he must have *intended* to divest the husband of all interest in the daughter's property. Thus this decision is reduced merely to the question of the *intention of the settler*, and is evidently not authority to support the position the Court takes in *Chapman v. Price.*

But the authority principally relied on by the Court is the English case of *Cooper v. MacDonald*, L. R. 7 Ch'y Div. 300. Here the devisor gave lands in trust for a daughter in tail and the rents and profits thereof, to her separate use, "*free from the debts, control or engagements of her husband.*" She, along with her husband, barred the estate tail, and took back an estate in fee simple to her separate use. The report does not mention whether the fee simple was to be held, *free from the control, &c. of her husband*, as the previous estate tail had been, but the language of Jessel, M. R., in delivering the opinion, sufficiently indicates that he considered such a clause attached. He says (italics mine): "The sepapate use is a creature of equity, and equity says the estate may be so limited to the married woman as that she can get rid of every possible interest of the husband; that is the meaning of a limitation to her separate use, and *free from his interference and control.* . . . Now on that point it is only necessary

to read one sentence from Lord Westbury's judgment in *Taylor v. Meads*, 4 D. J. & S. 597: He says 'the estate given to E. (the married woman in that case) is one and entire, being the equitable estate in fee, *with a declaration, the effect of which is that her husband shall have no interest in the estate so devised*, and that she shall have it to her separate use, *free from the control, debts, engagements or interference of her husband.*'"

At all events, *every case* cited in *Cooper v. MacDonald* either contains such a clause as that just given, or merely decides in general terms that the husband is entitled to curtesy in the separate estate of the wife, without qualification as to the wife's prior disposition of the land.

In *Cooper v. MacDonald* the court holds that in England the married woman may convey her separate estate as if she were *unmarried*, and that whether the estate be *real* or *personal*. Even supposing this to apply as well in the absence as in the presence of such expressions as those above-mentioned, yet the same rule would not apply with us; for, though she may, in Virginia, convey her *personal* estate as if sole, she can convey her *realty* only as the settlement directs, or as provided by law, *i, e.*, by deed (in which the husband must join), or by will. If the *settlement* expressly gives her the power to alienate her separate *real* estate as if she were *unmarried* (as the *law* seems to do in England), possibly the same result might follow, and the husband's curtesy be barred by her devise, but on the ground that such was the *settler's intent*.

But the mere fact that the married woman is allowed by the *statute* to devise would not seem, upon principle, to enable her to defeat the husband's curtesy thereby, any more than similar power given the husband should enable him to defeat the wife's dower. There is no reason for the one doctrine which may not, with equal force, be applied to the other.

The right *once vested* in the husband ought not to be divested by the *wife's* sole act, in the absence of any expressions in the instrument showing that to be the *settler's intention;* such a result is expressly prohibited in case of the wife's *legal* separate estate under the Married Woman's Act (although that act allows her to convey, as if she were unmarried, by her *sole act*), and there can be no reason why a different policy should prevail as to the married woman's equitable estate.

Chapman & Price, however, has recently received confirmation from the present court in the case of *Hutchings v. Commercial Bank of Danville*, 1 Va. Law Reg. 58. Here there were three deeds to Mrs. Sue

R. Hutchings: the first giving a house and lot to a trustee for her separate use, *free from the debts and liabilities* of her husband; the second to a trustee for her separate use, to sell, convey or *devise*, as she might direct; and the third to a trustee for her separate use, to sell, convey *or otherwise dispose of*, as she pleases. Mrs. Hutchings having devised the land to her two children, the husband's right to curtesy came before the court, and was denied, on the sole authority of *Chapman v. Price*.

With regard to the last two tracts, the husband's curtesy may perhaps be barred by the *devise*, or even by her sole act *inter vivos* simply, because the instrument creating the estate expressly gives her the *jus disponendi*, and an *intention* to deprive the husband of his marital rights, on the part of the settler, would be inferred, wherever they would interfere with the powers given the wife. But in the first deed the phrase "*free from the debts and liabilities* of her husband," can hardly be considered sufficient to establish such an intention on the part of the settler. Here, therefore, we must squarely face the question whether in the absence of expressions showing the settler's intention to allow it, a married woman, by her mere devise, can bar the husband's curtesy. It would seem, with all respect, that these decisions, the latter based upon the mere *dictum* contained in the former, which, even in its turn, is founded on English authorities which do not sustain the position, are not built on solid foundations of principle. It is to be hoped that when the question again arises it will be argued at large, and meanwhile it would be well not to accept too blindly as precedents the cases of *Chapman v. Price* and *Hutchings v. Commercial Bank of Danville*.

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